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Inapplicability of Erie V. Tompkins to Suits in Which the United States is Drawee of a Check

NOTES AND COMMENTS

CONFLICT OF LAWS

INAPPLICABILITY OF ERIE v. TOMPKINS TO SUITS IN WHICH THE UNITED STATES IS DRAWEE OF A CHECK

In April, 1936, a W.P.A. check was drawn on the Treasurer of the United States to the order of Clair Barner and mailed to him. Barner never received the check. An unknown person obtained it and, representing himself to be Barner, endorsed it to the J. C. Penney Co. of Clearfield, Pennsylvania which company in turn endorsed it to the defendant. Defendant then endorsed the check "Prior Endorsements Guaranteed" and collected it from the United States. The forgery was unknown to the government until November 1936. No notice was given to the defendant until January 1937 and the government did not ask for reimbursement until August 1937. The district court held that the rights of the parties were governed by Pennsylvania law which barred the United States from recovery because of the delay.[1] The Circuit Court of Appeals reversed.[2] Held, affirmed; federal law governs the rights of the parties. Clearfield Trust Co. et al. v. United States, 63 Sup. Ct. 573 (1943).

Since Erie R.R. v. Tompkins,[3] litigants in federal courts because of diversity of citizenship, have their rights determined by the law of the state in which the federal court sits. So far the doctrine has not been extended beyond diversity cases.[4]

In the instant case diversity of citizenship was not involved. Suit was brought by the government under a federal statute[5]; the check issued was for payment of services rendered under a federal

1. See note 13 infra.
2. United States v. Clearfield Trust Co., 130 F.(2d) 93 (C.C.A. 2d, 1942).
3. 304 U.S. 64 (1937). That case coming like a "bolt from the blue" overturned the reign of Swift v. Tyson, 16 Pet. 1 (U.S. 1842) which had prevailed for almost a century. Cook, "Federal Courts and Conflicts of Laws" (1941) 36 Ill. L.Rev. 493. Notes (1938) 22 Minn. L. Rev. 885, (1938) 86 U. of Pa. L. Rev. 896, (1938) 7 Geo. Wash. L. Rev. 257.
4. No cases have been found where the doctrine has been extended beyond diversity cases. Federal jurisdiction exists in diversity cases to insure non-resident parties of an impartial tribunal. See Marshall, C.J., in Bank of United States v. Deveaux, 5 Cranch 61, 87 (U.S. 1809). Because of this it seems just that the federal courts should not be allowed to declare a "hybrid" law governing litigants in federal courts who are there solely because of diversity of citizenship, no federal question being involved. See Justice Jackson, concurring in D'Oench, Duhme and Co. v. F.D.I.C., 315 U.S. 447, 466 (1942); United States v. Clearfield Trust Co., 130 F.(2d) 93 (C.C.A. 2d, 1942) where it is pointed out that the Erie R.R. v. Tompkins rule is probably limited to diversity cases.
5. 36 Stat. 1087 (1911), 28 U.S.C.A. §41 (1) (1941).

statute;[6] the forgery of the payee's signature was a crime against the United States.[7]

There have been numerous situations in federal courts where, although there was no constitutional provision or federal statute directly in point, the federal courts still did not apply the state law.[8] Thus, questions relating to national banks have been decided under "general doctrine" and state decisions have been held inapplicable.[9] Litigation affecting Indiana, in the absence of applicable federal statutes have been decided under "general" federal law.[10] The same result has been reached in condemnation proceedings.[11] Where the United States is a contracting party the majority of the decisions also hold that the Erie v. Tompkins doctrine is inapplicable.[12] It appears, therefore, that the court was adhering to the settled course of decisions in rejecting Pennsylvania law and adhering to federal law.

Under Pennsylvania law, the United States would have failed in this action since in that jurisdiction the burden is on the drawee to give prompt notice of the forgery, injury to the endorser being conclusively presumed from the mere fact of delay.[13] Under the law

6. 48 Stat. 55-58 (1934), 15 U.S.C.A. 721-728 (1941) (The Federal Emergency Relief Act).
7. Alvarado v. United States, 9 F.(2d) 385 (C.C.A. 9th, 1925); Hamil v. United States, 298 Fed. 369 (C.C.A. 5th, 1924).
8. Although Justice Brandeis in Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1937) said, "There is no federal common law," in another opinion delivered by him on the same day he said " . . . whether the water of an interstate stream must be apportioned . . . is a matter of federal common law upon which neither statutes nor decisions of either state can be conclusive." Henderlider v. La Plata Co., 304 U.S. 92, 110 (1937). What was meant by this statement is that federal courts have to apply state law in diversity cases except where the constitution, treaties or statutes of the United States are binding. Alamedo Co. v. United States, 124 F.(2d) 611 (C.C.A. 9th, 1941). Where a federal question arises, the federal courts can still delve into the common law and their own decisions as a backlog or source authority. See Justice Jackson concurring in D'Oench, Duhme and Co. v. F.D.I.C., 315 U.S. 447, 466 (1942), cited supra note 4.
9. McCarty v. Gault, 24 F. Supp. 977 (D.C. Oregon 1938); Dietrick v. Greaney, 309 U.S. 190 (1939). The doctrine is followed for liabilities under F.D.I.C. D'Oench, Duhme and Co. v. F.D.I.C., 315 U.S. 447 (1942). See Notes (1942) 28 Va. L. Rev. 821, (1942) 4 Ga. Bar J. 405, (1942) 26 Minn. L. Rev. 899.
10. Board of Comm. v. United States, 308 U.S. 343 (1939); United States v. Osage County, 251 U.S. 128 (1919).
11. Kole v. United States, 91 U.S. 367 (1875); United States v. Indian Creek Marble Co., 40 F. Supp. 811 (E. D. Tenn. 1941).
12. Royal Indemnity Co. v. United States, 313 U.S. 289 (1941); Kolker v. United States, 40 F. Supp. 972 (N.D. Md. 1941); United States v. Grogen, 39 F. Supp. 819 (D.C. Mont. 1941); Byron Jackson Co. v. United States, 35 F. Supp. 665 (S.D. Cal. 1940). Contra: Alamedo Co. v. United States, 124 F. (2d) 611 (C.C.A. 9th, 1941); United States v. Brookridge, 111 F. (2d) 461 (C.C.A. 10th, 1940).
13. Market Street Title Co. v. Chelten Trust Co., 196 Pa. 230, 145 Atl. 848 (1929); McNeely Co. v. Bank of N. America, 221 Pa. 588, 70 Atl. 891 (1908); Marks v. Anchor Savings Bank, 252 Pa. 304, 97 Atl. 339 (1916); State v. First National Bank, 203 Pa. 69, 52 Atl. 13 (1902).

as applied in the federal courts, however, it is consistently held that the cause of action for recovery of money paid as a result of the forgery accrues immediately upon payment, and notice of the forgery is not a condition precedent to suit against the indorser.[14] While unexplained delay or even inexcusable carelessness in not giving notice is not a bar to bringing the action, if the indorser has been injured by the drawee's failure to give notice this will be a complete defense to the suit.[15] No such injury was proved in this case.

Recovery by the drawee from the indorsee of a forged negotiable instrument has been allowed upon two theories—breach of warranty[16]

14. United States v. Nat'l Exchange Bank, 214 U.S. 302 (1908); Leather Manufacturers Bank v. Merchants Bank, 128 U.S. 26 (1888); Fed. Reserve Bank v. Atlanta Trust Co., 91 F. (2d) 283 (C.C.A. 5th, 1937); Fourth National Bank v. Gainesville Bank, 80 F. (2d) 49 (C.C.A. 5th, 1935); United States v. City Savings Bank, 73 F. (2d) 486 (C.C.A. 6th, 1934); Ladd v. United States, 30 F. (2d) 334 (C.C.A. 9th, 1929); United States v. National Bank of Republic, 141 Fed. 208 (C.C.D. Mass. 1902); United States v. National Exchange Bank of Boston, 141 Fed. 209 (C.C.D. Mass. 1902); United States v. National City Bank, 28 F. Supp. 144 (S.D.N.Y. 1939). See Note (1938) 47 Yale L.J. 827. Contra: United States v. Central National Bank, 6 Fed. 134 (E.D.Pa. 1881).

15. Ladd v. United States, 30 F. (2d) 334 (C.C.A. 9th, 1929); United States v. National Bank of Republic, 141 Fed. 208 (C.C.D. Mass. 1902); United States v. National City Bank, 28 F. Supp. 144 (S.D.N.Y. 1939); United States v. National Rockland Bank, 35 F. Supp. 912 (D.C. Mass. 1910). The fact that the drawee was the United States would have been no defense if actual damage had been caused by the delay. Although Justice Story made the general assertion that laches were never imputable to the government, "not because of any notions of sovereignty but because the government has to act through agents and can not be expected to act on time." United States v. Kirkpatrick, 9 Wheat. 720 (U.S. 1824), and this general language was followed in United States v. Thompson, 98 U.S. 486 (1878), this is not the law today. While laches are not imputable to the United States when it is asserting a sovereign or governmental right, United States v. Minnesota, 270 U.S. 181 (1925); Utah Power and Light Co. v. United States, 243 U.S. 409 (1916), when the government enters the domain of commerce it assumes all the responsibilities and submits itself to the same law that governs private individuals. United States v. National Exchange Bank, 270 U.S. 535 (1926); Cook et al. v. United States, 91 U.S. 389 (1875); United States v. National Exchange Bank of Baltimore, 1 F. (2d) 888 (C.C.A. 4th, 1924); United States v. National City Bank, 28 F. Supp. 144 (S.D.N.Y. 1939).

16. At the time the defendant received this check the payee's signature had been forged. The defendant endorsed the check over to the Fed. Reserve Bank "Prior Endorsements Guaranteed." A party that transfers a check by endorsement warrants that the instrument is genuine and is liable upon the warranty if any of the names are forged. United States v. National Exchange Bank, 214 U.S. 302 (1908); Fed. Reserve Bank v. Atlanta Trust Co., 91 F. (2d) 283 (C.C.A. 5th, 1937); Farmers State Bank v. United States, 62 F. (2d) 178 (C.C.A. 5th, 1932); Ladd and Tildon Bank v. United States, 30 F. (2d) 334 (C.C.A. 9th, 1929); U.S. v. Onondago Co. Savings Bank, 39 Fed. 259 (N.D.N.Y.

and recovery in quasi-contract.[17] While the weight of authority seems to follow the warranty theory,[18] the Supreme Court was not required to choose in the instant case, since the United States could recover under either theory.

CONSTITUTIONAL LAW

JONES v. CITY OF OPELIKA OVERRULED

Petitioners, Jehovah's Witnesses, went from door to door soliciting people to purchase religious books and pamphlets. The city of Jeannette, Pennsylvania, filed a complaint charging petitioners with failure to obtain a license as required by an ordinance. The lower court found them guilty and the Pennsylvania court of appeal affirmed the decision. Held, the ordinance is invalid as abridging the freedom of religion. Murdock v. Commonwealth of Pennsylvania, 63 Sup. Ct. 870 (1943). (Justices Jackson [at p. 882], Frankfurter [at p. 899], Roberts [at p. 899], and Reed [at p. 891] dissenting).

The Constitution declares that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." U.S. Const. Amend. I. These religious guaranties are limitations only on the federal government and do not protect the religious liberties of the people against state governments, unless the due process clause of the Fourteenth Amendment includes protection of religious liberty. Willis, "Constitutional Law" (1936) 502. Decisions of the United States Supreme Court hold that such is the case. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940); see Schneider v. State, 308 U.S. 147, 160 (1939); cf. Hamilton v. Regents of University of California, 293 U.S. 245 (1935).

The tax imposed by the Jeannette city ordinance is a flat license tax and is a condition precedent to the exercise of the constitutional privileges. The power to tax the exercise of a privilege is the power to control or suppress its enjoyment. Magnano Co. v. Hamilton, 292 U.S. 40 (1934). Therefore, unless the Jeannette city ordinance can

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1889); Bergam v. Avenue State Bank, 248 Ill. App. 516, 1 N.E. (2d) 432 (1936); Manufacturers Trust Co. v. Harriman National Bank, 237 App. Div. 401, 262 N.Y. Supp. 483 (1932); General Fire Assurance Co. v. State, 177 App. Div. 745, 164 N.Y. Supp. 871 (1917); Oriental Bank v. Gallo, 112 App. Div. 360, 98 N.Y.Supp. 561 (1906). Dean Ames has challenged this theory of recovery, "The Doctrine of Price v. Neal" (1891) 4 Harv. L. Rev. 297. See Kessler, "Forged Instruments" (1938) 47 Yale L.J. 873.

17. Recovery is allowed under this doctrine for mutual mistake of fact as to the genuineness of the signature of the payee. United States National Park Bank of New York, Fed. 852 (S.D. N.Y. 1881); First National Bank of Minnesota v. City National Bank of Holyoke, 182 Mass. 130, 65 N.E. 24 (1902); Welch v. Goodwin, 123 Mass. 71, 25 Am. Rep. 24 (1878); Merchants National Bank v. National Bank of Commonwealth, 139 Mass. 513, 2 N.E. 89 (1885). Some courts use the terms, warranty and quasi-contract, indiscriminately when allowing recovery and are not clear upon which basis recovery is allowed. New York Produce Exchange Bank v. 12th Ward Bank, 135 App. Div. 521, 19 N.Y. Supp. 988 (1909); City Bank v. National Bank, 45 Texas 213 (1876).

18. See note 16 supra.